

**NINTH AMENDMENT TO AGREEMENT BETWEEN  
THE CITY OF MILPITAS, CALIFORNIA AND  
THE CITY OF SAN JOSE, CALIFORNIA  
FOR IMPLEMENTATION OF PORTIONS OF  
THE SOUTH BAY WATER RECYCLING PROGRAM**

This **NINTH AMENDMENT TO AGREEMENT** is entered into on this \_\_\_\_ day of \_\_\_\_\_, 2006 (the "Effective Date"), by and between the CITY OF MILPITAS, a municipal corporation of the State of California ("MILPITAS") and the CITY OF SAN JOSE, a chartered municipal corporation of the State of California ("SAN JOSE"). MILPITAS and SAN JOSE may be referred to herein collectively as the "PARTIES."

**RECITALS**

**WHEREAS**, on June 13, 1995, the PARTIES entered into an agreement entitled "Agreement for Engineering, Construction and Construction Services by and between the City of Milpitas and the City of San Jose for Implementation of Portions of the South Bay Water Recycling Program" ("AGREEMENT"); and

**WHEREAS**, on June 24, 1997, the PARTIES entered into a First Amendment to the AGREEMENT to modify the scope of work and amend the schedule of payments to be made by SAN JOSE; and

**WHEREAS**, on August 11, 1999, the PARTIES entered into a Second Amendment to the AGREEMENT to modify the scope of work, increase project costs and amend the schedule of payments to be made by SAN JOSE; and

**WHEREAS**, on March 21, 2000, the PARTIES entered into a Third Amendment to the AGREEMENT to modify the scope of work, increase the project costs and amend the schedule of payments to be made by SAN JOSE; and

**WHEREAS**, on July 16, 2001, the PARTIES entered into a Fourth Amendment to the AGREEMENT to modify the scope of work, increase the project costs, amend the schedule of payments to be made by SAN JOSE, and extend the term of the AGREEMENT; and

**WHEREAS**, on April 21, 2003, the PARTIES entered into a Fifth Amendment to the AGREEMENT to modify the schedule of payments without increasing the amount payable by SAN JOSE; and

**WHEREAS**, on June 24, 2003, the PARTIES entered into a Sixth Amendment to the AGREEMENT to modify the schedule of payments without increasing the

amount payable by SAN JOSE, extend the term of the AGREEMENT, and modify the address for verification of insurance coverage; and

**WHEREAS**, on December 10, 2003, the PARTIES entered into a Seventh Amendment to the AGREEMENT to extend the term at no additional cost to CITY; and

**WHEREAS**, on June 22, 2004, the PARTIES entered into an Eighth Amendment to the AGREEMENT to extend the term at no additional cost to CITY; and

**WHEREAS**, the PARTIES desire to further amend the amended AGREEMENT to extend the term of the AGREEMENT through June 30, 2007, at no additional cost to CITY;

**NOW THEREFORE**, the PARTIES agree to amend the amended AGREEMENT as follows:

**SECTION 1.** Section 1 of the AGREEMENT entitled "Project Description, Scope of Work and Schedule" is hereby amended to read in its entirety as follows:

**1. PROJECT DESCRIPTION, SCOPE OF WORK AND SCHEDULE**

Subject to the appropriation of funds to the SBWRP by SAN JOSE and notification to MILPITAS by SAN JOSE of the availability of funds, specified work shall be performed on certain water facilities located in the City of Milpitas described in Revised Exhibit "A" entitled "Project Description." During the term of this AGREEMENT, MILPITAS shall provide the services described in Revised Exhibit "B" entitled "Scope of Work to be Provided by Milpitas" and SAN JOSE shall provide the services described in Revised Exhibit "C" entitled "Scope of Work to be Provided by San Jose." All exhibits referenced in this AGREEMENT are attached hereto and are incorporated herein by reference. All work shall be completed by June 30, 2007.

**SECTION 2.** THIRD REVISED EXHIBIT E, "INSURANCE AND BONDS" is amended to read as shown in REVISED EXHIBIT E, attached and incorporated into this Ninth Amendment.

**SECTION 3.** All of the terms and conditions of the amended AGREEMENT not modified by this Ninth Amendment shall remain unchanged and in full force and effect.

**WITNESS THE EXECUTION HEREOF** on the day and year first written above:

**CITY OF MILPITAS**

APPROVED AS TO FORM:

\_\_\_\_\_  
Steven T. Mattas, City Attorney

By: \_\_\_\_\_  
Charles R. Lawson, City Manager

ATTEST:

By: \_\_\_\_\_  
Emma Karlen, Finance Director

\_\_\_\_\_  
Mary Lavelle, City Clerk

**CITY OF SAN JOSE**

APPROVED AS TO FORM:

\_\_\_\_\_  
MOLLIE J. DENT  
Senior Deputy City Attorney

By \_\_\_\_\_  
LEE PRICE, MMC  
City Clerk

**THIRD REVISED EXHIBIT E**  
**INSURANCE AND BONDS**  
**Revision Effective as of Ninth Amendment**

**I. INSURANCE**

MILPITAS, at MILPITAS' sole cost and expense, shall procure and maintain for the duration of this AGREEMENT insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by MILPITAS, its agents, representatives, employees or subcontractors.

**A. Minimum Scope of Insurance**

Coverage shall be at least as broad as:

1. The coverage described in Insurance Services Office Form Commercial General Liability coverage ("occurrence") Form Number CG 0001 including products and completed operations; and
2. The coverage described in Insurance Services Office Form Number CA 0001 covering Automobile Liability, Code 1 "any auto", or Code 2 "owned autos" and Endorsement CA 0025. Coverage shall also include Code 8 "hired autos" and Code 9 "nonowned autos"; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Professional Liability Errors & Omissions.

**B. Minimum Limits of Insurance**

MILPITAS shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 combined single limit per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit will apply separately to this project/location or the general aggregate limit will be twice the required occurrence limit; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and

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3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of \$1,000,000 per accident; and

4. Professional Liability Errors & Omissions \$1,000,000 General Aggregate Limit.

**C. Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by CITY's Risk Manager. At the option of CITY, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects CITY, its officers, employees, agents and contractors; or MILPITAS shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the CITY.

**D. Other Insurance Provisions**

The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverages

a. Insured. The City of San Jose, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, MILPITAS; products and completed operations of MILPITAS; premises owned, leased or used by MILPITAS; and automobiles owned, leased, hired or borrowed by MILPITAS. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, employees, agents and contractors.

b. Contribution Not Required. MILPITAS' insurance coverage shall be primary insurance as respects CITY, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by CITY, its officers, employees, agents or contractors shall be excess of MILPITAS' insurance and shall not contribute with it.

c. Provisions Regarding the Insured's Duties After Accident or Loss. Any failure to comply with reporting provisions of the policies by MILPITAS shall not affect coverage provided CITY, its officers, employees, agents, or contractors.

2. All Coverages

Each insurance policy required by this AGREEMENT shall be endorsed to state that coverage shall not be suspended, voided, cancelled, or reduced in limits except after thirty (30) days' prior written notice has been given to CITY.

E. **Acceptability of Insurers**

Insurance is to be placed with insurers acceptable to CITY's Risk Manager.

F. **Verification of Coverage**

MILPITAS shall furnish CITY with certificates of insurance and with original endorsements affecting coverage required by this AGREEMENT. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the Risk Manager:

CITY OF SAN JOSE  
Risk Management  
Finance  
200 East Santa Clara Street  
San Jose, California 95113-1905

G. **Subcontractors**

MILPITAS shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements from each subcontractor.

II. **BONDS**

Any subcontractor contracted by Milpitas to perform services under this Agreement shall furnish a surety bond in an amount equal to one hundred percent (100%) of the Contract price as security for the faithful performance of the subcontract (Faithful Performance Bond) and shall also furnish a separate surety bond in an amount equal to one hundred percent (100%) of the subcontract price as security for the payment of all persons performing labor and

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furnishing materials in connection with this Agreement (Labor and Materials Bond).

The Faithful Performance Bond shall remain in full force and effect for a period of one (1) year after the Notice of Completion and acceptance of work by the Milpitas City Council. The Payment Bond shall remain in full force and effect at least six (6) months after the period in which stop notices may be filed (Civil Code SS 3249, 3184). Bonds shall be satisfactory to the City Attorney of the City of San Jose.

All alternatives, time extensions, extra and additional work under the subcontract may be made without giving notice or securing consent of the surety or sureties on the bonds.

Whenever any surety or sureties on any such bonds, or on any bond required by law for the protection of any claimant or assign under the bond, becomes insufficient, or has cause to believe that such surety or sureties has become insolvent or bankrupt, a demand in writing may be made of Contractor for such further bond or bonds or additional surety not exceeding that originally required, as is necessary, considering the extent of the work remaining to be done. No payment shall be made to Contractor or assignee until such further bond or bonds or additional surety has been furnished.